No. 11988

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

SAM CATRINO,

Appellant,

— vs. —

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States for the District of Montana.

GEORGE F. HIGGINS,
JAMES D. TAYLOR,
Attorneys for Appellant

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JURISDICTIONAL STATEMENT

In this case the Appellant was charged in Count One of an Indictment filed in the District Court of the United States, District of Montana, Missoula Division, with Subornation of Perjury in violation of Section 232, Title 18, U.S.C.A., by unlawfully, corruptly and feloniously procuring one James B. Rennaker to commit perjury in a cause being tried in the District Court of the United States for the District of Montana, where the Appellant was then on

trial, and testify for the Appellant to certain false matters (Tr. 3).

The Appellant was charged in Count Two of the same Indictment with Obstruction of Justice, in violation of the provisions of Section 241, Title 18, U.S.C.A., by corruptly causing one James B. Rennaker, to attend the trial in the District Court of the United States for the District of Montana, where the Appellant was then on trial, and testify for the Appellant to certain false statements (Tr. 4).

The District Court had jurisdiction by virtue of the provisions of Section 41, Title 28, U.S.C.A., under which the District Courts have original jurisdiction of all crimes and offenses cognizable under the authority of the United States.

A judgment of conviction having been rendered in the District Court, an appeal was taken to this Court under the New Federal Rules of Criminal Procedure, which follows Section 687, Title 18, U.S.C.A., effective March 21, 1946.

This Court has jurisdiction of the appeal by virtue of the provisions of Section 225, Title 28, United States Code.

STATEMENT OF THE CASE

The Appellant, Sam Catrino, was charged by an Indictment in which there were three counts.

In Count One the Appellant and John A. Reinhard were charged with Subornation of Perjury, in violation of Section 232, Title 18, U.S.C.A. (Tr. 3).

In Count Two the Appellant and John A. Reinhard were charged with Obstruction of Justice, in violation of Section 241, Title 18, U.S.C.A. (Tr. 4)

In Count Three John A. Reinhard and Lester LaVal-

ley, charged as John Doe, were charged with attempting to influence a witness, in violation of Section 241, Title 18, U.S.C.A. (Tr.5). The Appellant, Sam Catrino, was not charged against in Count Three. (Tr. 5).

The Appellant moved to dismiss Count Two of the Indictment upon the ground that an offense against the laws of the United States was not charged (Tr. 6) but the motion was denied. (Tr. 7)

The Appellant made an objection to Count Number One and Count Two of the Indictment as being identical. (Tr. 8)

The Appellant, Sam Catrino, presented a Motion to the Court for a separate trial (Tr. 8) which was denied. (Tr. 9)

The Appellant moved to dismiss Count One or Count Two of the Indictment, or to direct the Government to elect between Count One and Count Two for the reason that there is duplicity in the charges set forth in Counts One and Two; that they are identical charges; and that the Appellant would be prejudiced by having both Counts submitted to a jury against him; that each Count required identical proof, neither requiring proof of any fact not required by the other (Tr. 13). The Motion was denied (Tr. 15).

The Appellant, Sam Catrino, moved to sever the Third Count from the Indictment for the reason that he was not charged as a Defendant in said Count and that it was prejudicial to him in his trial on Counts One and Two of the Indictment (Tr. 11), which Motion was denied Tr. 15).

The cause was tried before a jury and at the conclusion

of the Government's case a Motion was made for a judgment of acquittal upon Count Two of the Indictment (Tr. 138). The Motion addressed to Count Two of the Indictment was denied by the Court (Tr. 147).

The Appellant offered testimony in his own behalf and at the conclusion of the evidence renewed his motion for a judgment of acquittal on Count Two (Tr. 221). The Motion was by the Court denied (Tr. 221) and the case was submitted to the jury.

The jury returned a verdict of guilty as to the Appellant on Count Two and not guilty as to Count One. The defendant, John A. Reinhard was found not guilty on Counts One, Two, and Three (Tr. 15, 16); and the charge against Lester LaValley, charged as John Doe, under Count Three was dismissed by the Government (Tr. 136).

The Appellant was sentenced to serve eighteen (18) months and to pay a fine of $350.00 (Tr. 17) from which judgment of conviction this Appeal is prosecuted (Tr. 18-19).

The Appellant contends that Count Two of the Indictment failed to charge an offense against the laws of the United States, and that the Motion to Dismiss the same should have been granted; that the Court erred in failing to grant the Appellants Motion for a Judgment of Acquittal on Count Two made at the close of the Government's case and renewed at the close of all the evidence; that the Court committed error in refusing to sever Count Three from the Indictment; that the Court erred in not dismissing from the Indictment either Count One or Count Two, or in not ordering the Government to elect as between Counts

One and Two upon the ground that the two Counts are identical, duplicitous, and the Appellant would be prejudiced by having both Counts submitted to the Jury; that the Court erred in the admission of testimony in the trial of said cause in support of Court Three of the Indictment, the Appellant, Sam Catrino, not being charged as a Defendant in said Count; that the Court erred in instructing the Jury that it could find the Appellant, Sam Catrino, guilty on Count Three of the Indictment; that the Court erred in failing to charge the Jury that there would have to be corroborating evidence under Count Two of the Indictment; that the Court erred in charging the Jury as to Count Three; that the Court erred in the admission of testimony in regard to separate and distinct offenses not charged in the Indictment; that the Court erred in not granting the Appellant a separate trial.

It is contended that these grounds, hereinafter separately set forth, require the reversal of the Judgment of Conviction in this case.

SPECIFICATIONS OF ERROR.

1. The Court erred in denying the motion for the dismissal of Count Two of the Indictment upon the ground that it fails to charge an offense against the laws of the United States (Tr. 7).

2. The Court erred in denying the Motion of the Defendant for an order for the entry of a judgment of acquittal upon the Second Count of the Indictment made at the conclusion of the Government's case upon the ground that the evidence was insufficient to sustain a conviction (Tr. 147).

3. The Court erred in denying the Motion of the Defendant for an order for the entry of a judgment of acquittal upon the Second Count of the Indictment made at the close of all the evidence upon the ground that the evidence was insufficient to sustain a conviction (Tr. 221).

4. The Court erred in denying Defendant's Motion to sever Count Three from the Indictment (Tr. 15).

5. The Court erred in not ordering the dismissal of either Count One or Count Two of the Indictment, or in refusing to direct the Government to elect between Count One and Count Two (Tr. 8, 15).

6. The Court erred in admitting testimony in support of Count Three of the Indictment wherein the Appellant was not charged as a Defendant.

7. The Court erred in its oral charge to the jury that the jury could find the Defendant, Sam Catrino, guilty under Count Three of the Indictment (Tr. 229) to which an exception was made before the jury retired, wherein it was stated "an exception is made to the Court's charge, in charging the jury as to Count Three, in that the charge was given in connection with the charge against Catrino under Counts One and Two. It is our contention that the charge to the jury under Count Three, wherein Catrino is not a Defendant, is prejudicial to him in his having a fair trial under Count One and Count Two" (Tr. 244).

8. The Court erred in failing to charge the jury that there would have to be corroborating evidence in support of the evidence of James B. Rennaker before a conviction could be had under Count Two of the Indictment; exception to the Court's oral charge upon this ground being

taken before the jury retired, as follows: "We except to that portion of the charge wherein the Court failed to charge the jury that there would have to be some corroborating evidence under Count Two, for it is our contention that said Count, in reality, states a charge of subornation of perjury, and the Count could not be proven or established without corroborating evidence to support the testimony of James Rennaker" (Tr. 243).

9. The Court erred in its oral charge to the jury that the testimony of one credible witness was sufficient to convict under Count Two of the Indictment (Tr. 233) to which an exception was taken before the jury retired (Tr. 243) as set forth in Specification of Error Number 8.

10. The Court erred in refusing to grant the Defendant a separate trial (Tr. 9).

11. The Court erred in the admission of testimony in regard to the attempted commission by the Appellant of subsequent, separate and distinct offenses not charged in the Indictment (Tr. 71-74). The substance of the testimony being that the Appellant contacted Mr. Rennaker subsequent to March 13, 1948, the date of the return of the Indictment, and that Rennaker testified that the Appellant had certain conversations with him wherein the Appellant was supposed to have attempted to secure Rennaker to testify that he, the Appellant, did not force Rennaker to lie on the witness stand and that he was supposed to have told Rennaker that he would put Rennaker back in business after the trial was over if he would testify that he didn't force him to lie on the witness stand . . . . . to which objection was made as follows: "To which we object your Honor,

on the grounds that this is something separate and apart from what is set forth in the Indictment and apparently they are going to attempt to show a subsequent offense, something subsequent to that which is charged in the Indictment, and it isn't material to any of the issue here, as to whether Sam and John are guilty under Count One and Count Two, or whether Reinhard and LaValley are guilty under Count Three" (Tr. 71-72).

The foregoing Specifications of Error were incorporated, in more succinct form, in the Statement of Points filed in the District Court (Tr. 22, 23, 24) and adopted in this Court (Tr. 268, 269).

ARGUMENT

Specification of Error Number 1.

"The Court erred in denying the motion for the dismissal of Count Two of the Indictment upon the ground that it fails to charge an offense against the laws of the United States (Tr. 7)".

Specification of Error Number 5.

"The Court erred in not ordering the dismissal of either Count One or Two of the Indictment or in refusing to direct the Government to elect between Count One and Count Two (Tr. 8, 15)."

The Indictment on which the Appellant was tried contoined Three Counts:

The charging part of Count One is as follows: (Tr. 3).

"Sam Catrino and John A. Reinhard, solicited, procured and caused the said James Rennaker to appear as a witness in the said United States District Court on March 13, 1946, upon the trial of said cause and to be by the Clerk of the Court sworn as a witness in said cause and to testify that he, the said James B. Rennaker, on the late evening of October 20, 1945, was in

the said Brunswick Bar and there saw a Mexican person buy a quantity of wine at the bar of said saloon, and deliver the same to one Pat A. Pierre; that said testimony so given was false and known by the Defendants Sam Catrino and John A. Reinhard and by the said James B. Rennaker, to be false; that in truth and in fact, said James B. Rennaker was not in said place, nor in the City of Missoula at the time referred to, to wit, the late evening of October 20, 1945, but was in or near the City of Butte, Montana, and that in truth and in fact, he did not see any person sell any wine or other liquor to the Indian ward, Pat A. Pierre, on October 20, 1945."

The gist of Count One is that the Appellant procured one James Rennaker to testify falsely in a case which was tried in the United States District Court on March 13, 1946.

The charging part of Count Two is as follows: (Tr. 4).

"particularly in this, that said Defendants did corruptly cause one James B. Rennaker to attend said trial and be sworn and testify as a witness for the said Defendants to certain false statements, which said Rennaker and said Catrino and Reinhard knew to be false, to wit, testimony that said Rennaker was in the Brunswick Bar at Missoula, Montana, on the late evening of October 20, 1945, and there saw an un-named Mexican purchase a quantity of wine at the bar and deliver it to an Indian ward named Pat A. Pierre."

The gist of Count Two is that Appellant procured one James Rennaker to testify falsely in that same case, to the same facts set forth in Count One.

The Third Count was not directed against the Appellant Catrino, and he was not made a party to the crime alleged to have been committed.

The Jury acquitted Appellant of committing subornation of perjury as charged in Count One but convicted him

of the crime of subornation of perjury charged in Count Two.

It is Appellant's contetion that subornation of perjury is not a crime contemplated under Section 241 making certain acts the crime of obstruction of justice.

In Section 241, Title 18, U.S.C.A., it is stated:

> "Whoever corruptly, or by threats or force, or by any Threatening letter or communication, shall endeavor to influence, intimidate. or impede any party or witness, in any Court of the United States or before any United States Commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, or who shall injure any party or witness in his person or property on account of his attending or having attended such court or examination before such commissioner or officer, or on account of his testifying or having testified to any matter pending therein, or who shall injure any such grand or petit juror, in his person or property on account of any verdict, presentment, or indictment assented to by him, or on account of his being or having been such juror, or who shall injure any such commissioner or officer in his person or property on account of the performance of his official duties, or who corruptly or by threats or by force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $5,000 or imprisoned not more than five years, or both. (As amended June 8, 1945, C. 178, Sec. 1, 59 Stat. 234.)

We assume that it is not necessary to submit authorities in support of our contention that subornation of per-

jury was a crime many years before the statute making certain acts the crime of obstruction of justice.

Section 231, Title 18, U.S.C.A., states as follows:

"Perjury. 'Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury and shall be fined not more than $2,000 and imprisoned not more than five years. (R.S. Sec. 5392; Mar. 4, 1909, c. 321, Sec. 125, 35 Stat. 1111.)"

In Section 232, Title 18, U.S.C.A., it is provided:

"Subornation of perjury. Whoever shall procure another to commit perjury is guilty of subornation of perjury, and punishable as in Section 231 of this title prescribed. (R.S. Sec. 5393; Mar. 4, 1909, c. 321, Sec. 126, 35 Stat. 1111.)

Appellant contends that where a statute makes specific facts a crime and there is a general statute covering other matters which may include the crime fixed in the specific statute, that the specific statute will prevail—that is, if there is a statute such as Section 232, Title 18, U.S.C.A. making subornation of perjury a crime, it prevails over a general statute such as Section 241, which covers many matters and subornation of perjury could only be construed to be a crime under such section by judicial interpretation.

Appellant was not charged with having by force or threats attempted to impede, influence, or intimidate any person, Court, or officer, commissioner, or grand or petit juror but he is charged with having procured a witness to

give false testimony. In other words, in Count Two the Appellant was charged with the offense of subornation of perjury, designating the crime in said Count as obstruction of justice. Here we have a situation where the Appellant was directly charged in Count One with the crime of subornation of perjury, and was acquitted of that charge, and convicted by the jury on Count Two of having committed the same act of which he was charged in Count One and acquitted.

We may concede for the sake of argument that subornation of perjury was contemplated in Section 241 as one of the acts which constitutes obstruction of justice. However, we do not admit that obstruction of justice, as defined by Section 241, includes subornation of perjury, for the reason that subornation of perjury was made a crime and a punishment fixed prior to the enactment of Section 241, making obstruction of justice a crime. We further contend that the Government, having elected to try the Appellant upon a charge of subornation of perjury, that it is precluded from trying him in the same Indictment for the same crime by simply stating that this subornation of perjury constituted the crime of obstruction of justice. It seems absurd to seriously urge the contention that a crime other than subornation of perjury is charged in Count Two of the Indictment.

In 22 C.J.S. Section 9, Page 61, it is stated:

> "A single act or transaction may not be split into two or more separate offenses,"

The testimony submitted on the part of the Government in the trial which resulted in the conviction of the

Appellant, Catrino, of the crime charged in Count Two, was the same testimony that was submitted by the Government in support of the allegations contained in Count One. There was no effort to present any facts, or present any testimony other than the testimony of the self-confessed perjurer, James B. Rennaker, that the appellant induced him to testify falsely in the case referred to in Count One and likewise in Count Two. It would seem that it is unnecessary to cite judicial determinations in support of this contention. The Appellant Catrino was charged in Count One with subornation of perjury. He was charged in Count Two with the obstruction of justice by that same charge of subornation of perjury. There is not a single allegation in Count Two other than the charge of subornation of perjury contained in Count One.

The details of the charge of subornation of perjury are not as fully set forth in Count Two as in Count One but it is attempted to be alleged in Count Two that the Appellant Catrino committed the crime of obstruction of justice by this very act of subornation of perjury contained in Count One, and the Government having elected to charge subornation of perjury in Count One, certainly is estopped from alleging that the Appellant was guilty of the obstruction of justice by this same alleged subornation of perjury.

If, as contended, that subornation of perjury is made a crime under two statutory provisions, the test seems to be that where the same act constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses is whether each requires proof of a fact which the other does not.

"Casebeer vs. United States 87 F. (2d) 668."

Applying this test, which is apparently universal, can it be said that any testimony, in addition to the testimony required in the establishment of Count One was required in order to establish the charge in Count Two.

The charges are identical. This being true the Court should have ordered the Government to elect on which charge he should stand trial or should have dismissed either Count One or Count Two and it was prejudicial error not to have done so.

Specification of Error Number 8.

"The Court erred in failing to charge the jury that there would have to be corroborating evidence in support of the evidence of James B. Rennaker before a conviction could be had under Count Two of the Indictment; exception to the Court's oral charge upon this ground being taken before the jury retired, as follows: "We except to that portion of the charge wherein the Court failed to charge the jury that there would have to be some corroborating evidence under Count Two, for it is our contention that said Count in reality states a charge of subornation of perjury, and the Count could not be proven or established without corroborating evidence to support the testimony of James Rennaker." (Tr. 243).

Specification of Error Number 9.

"The Court erred in its oral charge to the jury that the testimony of one credible witness was sufficient to convict under Count Two of the Indictment (Tr. 233) to which an exception was taken before the jury retired (Tr. 243) as set forth in Specification of Error Number 8."

Specification of Error Number 2.

"The Court erred in denying the Motion of the Defendant for an order for the entry of a judgment of

acquittal upon the Second Count of the Indictment made at the conclusion of the Government's case upon the ground that the evidence was insufficient to sustain a conviction. (Tr. 147)."

Specification of Error Number 3.

"The Court erred in denying the Motion of the Defendant for an order for the entry of a judgment of acquittal upon the Second Count of the Indictment made at the close of all the evidence upon the ground that the evidence was insufficient to sustain a conviction (Tr. 221)."

Exception was taken to the Court's oral charge to the jury, on the ground that the Court failed to charge that some corroborating evidence was necessary under Count Two, it being our contention that the Count states a charge of subornation of perjury, and it could not be established without corroborating evidence to support the testimony of James Rennaker. (Tr. 243). As to Specification of Error Number 8 an exception was taken before the jury retired. (Tr. 243.) The same exception as was taken to Specification of Error Number 8 was taken as to Specification of Error Number 9 (Tr. 243).

On any theory, James Rennaker and the Appellant were accomplices in committing the alleged crime charged in Count Two of the Indictment. Appellant Catrino was convicted on the uncorroborated testimony of the accomplice, James Rennaker. James Rennaker was a self-confessed perjurer. If, as the Court instructed the jury, some corroboration is necessary to support a judgment of conviction of the charge of subornation of perjury, certainly it would be a fiction to say that corroborating evidence is not required to convict Appellant on the charge of the obstruc-

tion of justice, where the alleged acts constituting the crime of obstruction of justice, is the crime of subornation of perjury.

The Court instructed the jury that in so far as the charge in Count Two is concerned, a conviction could be had on the testimony of one credible witness (Tr. 233). The record may be searched from cover to cover and corroborating evidence or facts can not be discovered which in any manner corroborate the testimony of the witness Rennaker. Appellant took exception to the oral charge to the jury that the Appellant Catrino could be convicted under Count Two without any corroboration of the witness Rennaker (Tr. 243).

It is not contended that there was no corroborating testimony to disclose that Rennaker had previously perjured himself, but in Count Two Rennaker and Appellant were accomplices, and the Court should, of its own motion, have instructed the jury that the Appellant could not be convicted on the testimony of Rennaker without some corroboration, at least to have instructed the jury that Rennaker's testimony should be received with great caution.

If it is contended that the acts of these two men committed the crime of obstruction of justice, they are accomplices, and if they are accomplices, it is universally held that you can not convict on the uncorroborated testimony of an accomplice and the Court should have so instructed the jury, even though a request to that effect was not made.

> "In a criminal case the Court must instruct on all essential questions of law, whether requested or not.
>
> Morris v. United States (C.C.A. 9) 156 F. (2) 525
> Miller v. United States (C.C.A. 10) 120 F. (2d) 968

Anderson v. United States (C.C.A. 9) 157 F. (2d) 429.

However, Appellant offered an instruction, which was refused by the Court as effecting the other Defendant, John Reinhard, but a similar instruction should have been given as to Appellant Catrino (Tr. 255).

It is to be observed that the Court instructed the jury that it was not necessary that the testimony of this self-confessed perjurer, Remaker, be corroborated in order to establish the charge in Count Two (Tr. 233).

Appellant offered an Instruction which was refused embodying the principle that there must be some corroborating circumstances, at least, to establish the charge set forth in Count Two (Tr. 260).

The Appellant, Catrino, at the conclusion of the Government's case and again when all the evidence was in moved for the entry of a judgment of acquittal. Both Motions were over-ruled.

Appellant was convicted on the Second Count of the Indictment on the testimony of Rennaker. There was no testimony submitted to corroborate him.

In this Count, the charge being obstruction of justice, committed by Appellant's procuring Rennaker to commit perjury, the two offenders were accomplices and neither could be convicted of any crime unless his testimony was corroborated. Rennaker admits that he committed perjury and, in the absence of any testimony to corroborate Rennaker's testimony, the Appellant, Catrino, stands convicted on the testimony of a self-confessed perjurer. The testimony of a credible witness of which the Court speaks in its instructions to the jury, as being sufficient to establish

the crime charged in Count Two was missing, unless we assume a perjurer qualifies for that class. We contend that a credible witness does not include a witness who confesses he is a perjurer and, this being true, the Court was in error in not granting our motion for an order for the entry of a judgment of acquittal at the conclusion of the Government's case or when all the evidence was in.

Assumnig, for the sake of argument, that Rennaker was not an accomplice with Catrino, we are still in the same position; the Appellant, Catrino, was convicted on the testimony of a confessed perjurer.

In the case of People v. Evans, 40 New York, Page 1, one of the very leading cases on this subject, the Court said:

> "Now, what is involved in such a verdict? The jury must, by their verdict, convict Near of perjury, for this is the very question to be tried; and after they have done that, to place their verdict of the defendant's guilt, in suborning him, upon the sole uncorroborated evidence of this perjured witness, who, for the paltry sum of $25, would swear to an alibi to save a guilty burglar and thief from the just punishment due to his crimes." . . . . . .
>
> "This rule can hardly exist in every case, consistent with another rule of evidence, which has become a maxim of the law of evidence. It is a rule for the control and guidance of the jury, and which is, that if the jury find the witness has sworn corruptly false in one material thing, they shall pronounce him false in his whole testimony, and utterly disregard it. The maxim of the law in this respect is, "falsus in uno; falsus in omnibus," false in one thing, false in all things." . . . . . .
>
> "Now, how does this principle apply to the case at

bar? The jury must find, from Near's own testimony, before they can convict the defendant, that he, Near, has corruptly committed perjury. Applying the principle that if the testimony of the witness be corruptly false in one thing, the whole must be rejected. I do not see how the charge in this case can be sustained." . . .

. . . .

"No jury should ever have the opportunity given them by any court to render so disgraceful a verdict, in a court of justice, as this. The jury are required literally to stultify themselves."

The language of this case was cited with approval in Hammer v. United States, 271 US 620, 70 L ed 1118, 46 S Ct 603;

See also 41 Am. Jur. Section 78, Page 43.

Specification of Error Number 4.

"The Court erred in denying Defendant's Motion to sever Count Three from the Indictment (Tr. 15).

Specification of Error Number 6.

"The Court erred in admitting testimony in support of Count Three of the Indictment wherein the Appellant was not charged as a Defendant.

Specification of Error Number 7.

"The Court erred in its oral charge to the jury that the jury could find the Defendant, Sam Catrino, guilty under Count Three of the Indictment (Tr. 229) to which an exception was made before the jury retired, wherein it was stated "An exception is made to the Court's charge, in charging the jury as to Count Three, in that the charge was given in connection with the charge against Catrino under Counts One and Two. It is our contention that the charge to the jury under Count Three, wherein Catrino is not a Defendant, is prejudicial to him in his having a fair trial under Count One and Count Two.' (Tr. 244)"

Specification of Error Number 10.

"The Court erred in refusing to grant the Defendant a separate trial (Tr. 9)"

Count Three charges that John A. Reinhard and John Doe, whose true name is unknown did, on or about October 20, 1945, unlawfully, corruptly and feloniously endeavor to influence one Pat Pierre, a witness in a cause entitled United States of America vs. Sam Catrino and John Reinhard, then pending in the United States' District Court for the District of Montana, in which the said Reinhard and Catrino were charged with unlawfully selling a quantity of wine to Pat Pierre, an Indian Ward, in that they corruptly offered Pat Pierre a sum of money as a bribe to procure him to testify that a bottle of wine which was in fact sold to him by the Defendant, John Reinhard, was sold to him by an unknown Mexican and that they stated to said Pierre that they would back him up in said false testimony.

Appellant, Sam Catrino was not charged with having committed the offense alleged in Count Three, nor was it charged that he conspired with Reinhard and this unknown person to make any attempt to procure this man, Pat Pierre, to testify or refuse to testify in the case. Pat Pierre was the person to whom it was alleged in Count One and likewise in Count Two, wine was sold by the Defendant Reinhard while in the employ of the Appellant, Catrino.

The testimony submitted in support of Count Three was necessarily highly prejudicial to the Appellant, Catrino. It is difficult to determine what effect this testimony had with the jury sitting in the trial of the cause and

which rendered its verdict convicting the Appellant of the charge contained in Count Two.

It would seem that a fair trial accorded any person should not permit any information to be considered by a jury which might in any manner influence a jury or prejudice a jury against a person charged with crime and unless the testimony is directed to the charge on which he is standing trial it should not be permitted to be considered by a jury.

Admitting such testimony deprived the Appellant of a fair trial.

Rule 8 of the new Federal Rules of Criminal procedure, following Section 687, Title 18, U.S.C.A. Page 230, provides:

> "Rule 8. Joinder of offenses and of Defendants:
>
> (a) JOINDER OF OFFENSES. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) JOINDER OF DEFENDANTS. Two or more defendants may be charged in the same Indictment or Information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such Defendants may be charged in one or more counts together or separately and all of the Defendants need not be charged in each count."

Under the above rule the joinder of these offenses and of these Defendants into one Indictment was improper.

The Appellant was charged under Count One and

Count Two (Tr. 3, 4) with committing the offense therein charged, on or about March 13, 1946. Count Three of the Indictment charges the Defendants Reinhard and Lester LaValley with committing the offense therein charged on or about October 20, 1945. The Third Count in the Indictment is a separate and distinct transaction from the one set forth in Count One and Count Two.

There are two separate and distinct transactions set forth as between Count One and Count Two and the third Count and the rights of the Appellant were substantially prejudiced, occasioned by the joinder of the offenses and Defendants in Count Three of the Indictment. In this connection see

United States v. Cataneo—167 F. (2d) 820.

The question therein involved was a joinder of Indictments. However, there is a very able discussion of the application of Rule 8 (supra). In that case it was stated:

> "Rule 8 (b) permits the joinder of two or more defendants in the same indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

We submit that the Motion to Sever Count Three from the Indictment should have been granted.

The Court erred in admitting testimony in support of Count Three of the Indictment wherein the Appellant was not charged as a Defendant for the reason that the very nature of the testimony was prejudicial to the Appellant in having a fair trial under Count One and Count Two of the Indictment for the reason that under that charge the Government attempted to show that John A. Reinhard and

Lester LaValley had unlawfully, corruptly and feloniously endeavored to influence one Pat A. Pierre, a witness in the cause entitled United States of America vs. Sam Catrino and John Reinhard in that they offered said Pat A. Pierre a sum of money as a bribe to procure him to testify that a bottle of wine which was alleged to have been sold to said Pierre by said Defendant John A. Reinhard was sold to said Pierre by a Mexican, and stated to said Pierre that they would back him up in said false testimony (Tr. 115-120).

That the admission of such testimony under Count Three was highly prejudicial to the Appellant, Sam Catrino, and prevented him from having a fair trial under Count Two of the Indictment, under which he was convicted and permitted the jury to arrive at their verdict by compromise and in the consideration of evidence that did not apply to the Appellant.

The Court instructed the jury that they could find the Appellant, Sam Catrino, guilty under Count Three of the Indictment (Tr. 229) even though he was not charged as a Defendant under said Count, to which oral charge to the jury the Defendant excepted (Specification of Error Number 7, above).

All of the above errors readily brings one to the conclusion that the Appellant was greatly prejudiced in having a fair trial under the two Counts in which he was charged as a Defendant, which errors clearly point out the reason the Court erred in refusing to grant the Appellant's Motion for a Separate trial. (Tr. 9).

Specification of Error Number 11.

"The Court erred in the admission of testimony in regard to the attempted commission by the Appellant of subsequent, separate and distinct offenses not charged in the Indictment (Tr. 71-74). The substance of the testimony being that the Appellant contacted Mr. Rennaker subsequent to March 13, 1948, the date of the return of the Indictment, and that Rennaker testified that the Appellant had certain conversations with him wherein the Appellant was supposed to have attempted to secure Rennaker to testify that he, the Appellant, did not force Rennaker to lie on the witness stand and that he was supposed to have told Rennaker that he would put Rennaker back in business after the trial was over if he would testify that he didn't force him to lie on the witness stand . . . .. to which objection was made as follows: 'To which we object your Honor, on the grounds that this is something separate and apart from what is set forth in the Indictment and apparently they are going to attempt to show a subsequent offense, something subsequent to that which is charged in the Indictment, and it isn't material to any of the issues here, as to whether Sam and John are guilty under Count One and Count Two, or whether Reinhard and LaValley are guilty under Count Three.' (Tr. 71-72)"

The testimony of the witness, Rennaker, relates to an alleged attempt on the part of the Appellant to influence the testimony of the witness, Rennaker, which evidence was in regard to a separate, distinct and subsequent offense, of which the Appellant was not charged in the Indictment.

Count One and Count Two of the Indictment in which the Appellant was charged alleges that the offense was committed on or about March 13, 1946. In introducing the evidence herein outlined, the Government sought to prove that the Appellant attempted to commit a subsequent,

separate and distinct offense, subsequent to the 13th of March, 1948.

Over objection the witness was permitted to give this testimony. (Tr. 72).

We submit that this testimony was not admissible upon the question of intent as indicated by the Court (Tr. 72), that evidence of another offense, to be admissible, must show prima facie the commission of a complete offense.

In 20 Am. Jur. Sec. 309, at Page 287, it is stated:

"A person, when placed upon trial for the commission of an offense against the criminal laws, is to be convicted, if at all, on evidence showing his guilt of the particular offense charged in the indictment against him. It is a well established common-law rule that in a criminal prosecution, proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are of the same nature as the one charged in the indictment, is incompetent and inadmissible for the purpose of showing the commission of the particular crime charged, unless the other offenses are connected with the offense for which he is on trial."

In 20 Am. Jur. Sec. 317, at Page 298, the rule is stated:

"317. PROOF OF SUBSEQUENT OFFENSES. There is a difference of opinion as to whether proof of offenses committed after the commission of the particular offense with which the accused is charged is ever admissible in evidence against him in the prosecution of the first offense. According to one line of authorities, evidence of offenses committed subsequent to the act charged is never admissible in evidence. Other authorities favor the admissibility of such proof in certain instances, as in the cases of offenses arising out of sexual intercourse, upon the theory that subsequent acts disclose the disposition of the parties."

We submit that the evidence as to these alleged con-

versations between Rennaker and Catrino was not admissible in this case and that this evidence was highly prejudicial to the Appellant.

CONCLUSION

It is respectfully submitted that the judgment of conviction should be reversed for the reasons hereinbefore stated.

Respectfully submitted,

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